

DOCKET FILE COPY ORIGINAL

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

RECEIVED

JUL 22 1993

In re Application of )

MARTHA J. HUBER, et al., )

For Construction Permit for a )  
New FM Station on Channel 234A )  
In New Albany, Indiana )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

MM Docket No. 93-51

To: The Honorable Richard L. Sippel  
Administrative Law Judge

STATON'S OPPOSITION TO PETITION TO ENLARGE

Donald J. Evans  
Marianne H. LePera

McFadden Evans & Sill  
1627 Eye Street, N.W.  
Suite 810  
Washington, D.C. 20006  
(202) 293-0700

Attorneys for Staton  
Communications, Inc.

July 22, 1993

No. of Copies rec'd  
List A B C D E

0+6

## TABLE OF CONTENTS

Table of Contents.....	i
Summary.....	ii
A. No Real Party-in-Interest Issues is Raised.....	2
B. Staton Did Not Misrepresent its Financial Qualifications.....	6
C. Ms. Staton Did Not Intend to Deceive the Commission in Signing the Stock Subscription and Shareholders' Agreement.....	10
D. Conclusion.....	12

## SUMMARY

Staton Communications, Inc. ("Staton") opposes the Petition to Enlarge Issues filed by Martha J. Huber ("Huber"). In her Petition, Huber alleges that Staton's consultant and nonvoting shareholder are the real parties-in-interest to Staton's application. Staton's consultant has no ownership interest, past future or present in the application, and the interest and

RECEIVED

JUL 22 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Application of )  
 )  
 **MARTHA J. HUBER, et al.,** ) **MM Docket No. 93-51**  
 )  
 For Construction Permit for a )  
 New FM Station on Channel 234A )  
 In New Albany, Indiana )

To: The Honorable Richard L. Sippel  
Administrative Law Judge

**STATON'S OPPOSITION TO PETITION TO ENLARGE**

Staton Communications, Inc. ("Staton"), by its attorneys, opposes the Petition to Enlarge Issues filed by Martha Huber ("Huber") on July 9, 1993 for the reasons set forth below. Huber's Petition represents a further effort in the scorched earth campaign of harassment which Huber seems to have launched against the other applicants in this proceeding. Apparently fearful of the outcome of a simple comparative evaluation, Huber is now going to outrageous lengths to manufacture issues against other applicants. Some of the allegations raised by Huber are so far fetched as to border on abuse of process. This wasteful and counter-productive litigation-for-litigation's-sake should not be countenanced. As will appear, Huber's motion is either directly contrary to Commission precedent or unsupported by the pertinent facts, and should therefore be denied.

A. No Real Party-In-Interest Issue is Raised.

Huber urges the addition of a "real party-in-interest" issue against Staton on the grounds that Staton's non-voting stockholder (Mr. Ken Ramsey) and a consultant named Charlie Thompson are real parties to the Staton application. The proposition that Mr. Thompson is a party-in-interest to the Staton application is, not to put too fine a point on it, absurd. It is undisputed that Mr. Thompson is a broadcast consultant who is knowledgeable about putting together broadcast applications and who has represented numerous broadcast applicants, including several with which Mr. Ramsey was connected, in the past. It is undisputed that Mr. Thompson contacted several potential partners on Mr. Ramsey's behalf, arranged for the services of an engineer, recommended an attorney, and helped to locate a site.

It is also undisputed that Mr. Thompson has no past, present or future ownership interest in Staton whatsoever and has no continuing connection with the applicant of any kind. It is undisputed that Mr. Thompson has never put a penny of his own money into the company and has no right to receive any of the proceeds of the venture. It is undisputed that Mr. Thompson never made any decisions about the application or its component parts. As an agent for the company, Mr. Thompson simply provided a specific service for a specific fee. See Declaration of Charles J. Thompson included as Attachment 1 hereto. He was paid for that service as

agreed. (Ramsey Dep. pp. 22, 25).<sup>1/</sup> Huber cites not a single case -- because none exists -- to support the proposition that a professional who assists an applicant in putting together an application somehow becomes a "party-in-interest." If that were true, every attorney in this proceeding (with the exception of the undersigned) would necessarily have to be designated a party-in-interest. Huber's position here is so blatantly off-the-wall and so patently unsupported in law or fact as to border on the abusive.

The request for a real party-in-interest issue with respect to Mr. Ramsey is, if possible, even more problematical. The Review Board has concisely stated the well-established legal test for adding a real party-in-interest issue: "whether a person who is not a principal has an ownership interest or will be in a position to control the operation of the station." Sound Broadcasting Co., 69 RR 2d 776, 779 (Rev. Bd. 1991) (Emphasis added). (See also Opportunity Broadcasting of Shreveport, 68 RR 2d 1561 (Rev. Bd. 1991), where a real party-in-interest issue was added against a limited partner who was originally not disclosed as a partner but provided most of the financing.) Here, Mr. Ramsey was plainly set forth in the Staton application as a non-party equity owner. All particulars about his broadcast interests were set forth in some detail in the application. Mr. Ramsey has appeared at his deposition and provided documents on the basis that he is clearly a party subject to the jurisdiction of the ALJ. He

---

<sup>1/</sup> Cited pages from deposition transcripts are provided in Attachment 4 hereto.

has never denied, and, indeed, has affirmatively asserted that he is a participant in Staton. Under these circumstances it is unclear what factual "issue" would be resolved by designation of a real party-in-interest issue.

Huber's reliance on Weyburn v. FCC, 984 F. 2d 1220 (D.C. Cir. 1992) is entirely misplaced. First, Huber misstates the Court's holding on the real party-in-interest issue, a curious error since Huber's counsel apparently represented one of the appellants. More importantly, the applications at issue in Weyburn were filed in the pre-1989 era when non-voting shareholders like Mr. Ramsey were not a party to an application in any way. Very limited information about them had to be supplied under the old version of Form 301. There was no such category as a "non-party equity owner." Thus, the Weyburn Court could well have felt that the Commission should have inquired into the real party-in-interest status of persons who apparently wielded considerable power in the applicant at issue, yet were nowhere to be found in the application. Here, of course, Mr. Ramsey's position in the company has been acknowledged from the outset.

We presume, of course, that Huber will attempt to prove that Mr. Ramsey's limited activities at the pre-formational stage of Staton's existence should impact negatively on Staton's comparative credit. That is entirely permissible and part of the process of testing comparative proposals. However, Huber's attempt to add a basic qualifying real party-in-interest issue directly contravenes the teaching of Evansville Skywave, Inc., 7 FCC Rcd.

1699 (1992). There one applicant had moved to add an issue against another applicant identical in substance to that requested by Huber here.<sup>2/</sup> The petitioning applicant there set forth -- with far greater support than that proffered by Huber here -- a litany of circumstances which might be relevant to the degree of integration credit to which the applicant would be entitled. In that case the full Commission reversed the ALJ's addition of the issue. The Commission held that factual circumstances which might warrant diminution of an applicant's comparative credit were not matters that went to the basic qualifications of the applicant. The Commission rejected the notion that a basic qualifying issue was appropriate in these circumstances. "It is more appropriate to analyze integration proposals under a comparative issue in terms of their overall reliability." Id. at ¶ 16. The Commission clearly intends that applicant structures should be tested fully but only on a comparative basis. The Commission's determination in Evansville Skywave was particularly compelling since the issue had been added by the ALJ and a full hearing had been held on it. An enormous amount of time and effort by the applicant and the Commission itself were simply wasted.

To be sure, a sham applicant issue may be added where an applicant has "concealed specific information," or "made deliberate misrepresentations." Id. at ¶ 17. But here, as in Evansville Skywave, all of the pertinent information was candidly set forth by

---

<sup>2/</sup> In Evansville Skywave, Inc., the issue was couched as a "real party in control" issue but the basis for the issue was exactly like that requested here.



Mildred Staton or Mr. Ramsey themselves, either in the application or in response to discovery questions. The very pages of Mr. Ramsey's deposition cited by Huber attest to his candor in having

hand "at the time it files its application." Id. at 3864 (emphasis added). As will be demonstrated below, Staton not only had a committed source of funding at the time Ms. Staton certified the application on November 13, 1991, but it also had documentation on hand at the time the Staton application was filed with the FCC on November 15, 1991. This is undisputed. Huber simply misstated the applicable requirement.

As indicated in the Declaration of Mr. Ken Ramsey, included as Attachment 2 hereto, Mr. Ramsey provided the bank with a draft of the proposed letter. (Ramsey Dep. p. 52). The bank's loan board had to approve the bank letter. (Ramsey Dep. p. 53). As indicated in the declaration of Mr. Ramsey, the bank's loan board did approve the conditional loan commitment on or before November 13, 1991, the same day that Mildred Staton certified Staton's financial qualifications on the application, and two days before the application was filed at the FCC. Thus, the bank's approval, and even the language of the bank letter, were known well before the signed letter was produced by the bank on November 15, 1991. At the time Mildred Staton certified the financial qualifications of Staton Communications, Inc., she had already been informed of the bank's approval of the bank letter. See Attachment 3 hereto, Declaration of Mildred Staton. Accordingly, Ms. Staton truthfully certified on November 13, 1991 that sufficient funds were available from committed sources.

Because Mr. Gainey's secretary was not in for several days after the Board's approval, there was a delay in the typing of the

letter. See Declaration of Kenneth Ramsey, included as Attachment 2 hereto. Still, the bank letter was signed and was in the hands of Mr. Ramsey on November 15, 1991, the day that the Staton application was filed at the FCC. See Declaration of Kenneth Ramsey, included as Attachment 2 hereto.

In revising the financial requirements for FCC Form 301, the Commission sought to eliminate the filing of applications by entities which were financially unqualified at the time of filing. As demonstrated herein, Staton was fully financially qualified at the time its application was filed. Moreover, Staton's application properly and accurately indicated the amount and source of funding upon which it relied. (Section III of Staton app., included as Attachment 5 hereto; Staton Dep. pp. 37, 38). These two factors are the additional safeguards which the Commission felt would ensure that applicants had correctly certified their financial qualifications. See Revision of FCC Form 301, 4 FCC Rcd. at 3859.

Lynn Broadcasting, 7 FCC Rcd. 8563 (Rev. Bd. 1992), is a case which contains facts strikingly similar to the instant circumstance. In Lynn, a mutually-exclusive applicant asserted that its competitor was not financially qualified because he had no written documentation on hand of the availability of financing when his application was filed, but merely relied upon an oral representation that a new financial letter would be forthcoming. Lynn Broadcasting, 7 FCC Rcd. at 8565. Although the Review Board acknowledged the new requirements of Revision of FCC Form 301, that documentation must be on hand at the time the application is filed,

the Board nevertheless decided that the facts presented in Lynn satisfied "the Commission's heightened standards for financial certification" and that those standards were not "intended to be applied in such an overarching, technical manner" so to result in the financial disqualification of this applicant. Id. Indeed, the Review Board sanctioned the filing of the application based upon an oral agreement to provide the necessary funding. Clearly, Staton has satisfied the requirements of Revision of FCC Form 301, and has exceeded the standard announced in Lynn, because Staton actually had received the signed bank letter on the day its application was filed at the FCC. Staton merely relied upon the bank's verbal commitment, as well as the draft bank letter, when Ms. Staton signed the application two days before its filing.

To characterize Ms. Staton's action in certifying the financial qualifications of Staton as a misrepresentation is absurd. The sole basis of the addition of the currently pending financial issue against Staton was the ambiguity, subsequently fully explained by Staton's banker, regarding the nature of the required participation of Mr. Ramsey and Ms. Staton. Yet even more important, there was absolutely no intention on the part of Ms. Staton to deceive the Commission in certifying the application. Huber alleges that Mildred Staton had a clear motive to misrepresent Staton's financial qualifications and that Mildred Staton did misrepresent Staton's financial qualifications. However, no such motive existed, as Staton had already received the approval of the bank's loan board for the issuance of the bank letter, thus allowing her

to check the box on FCC Form 301 indicating that the funds were committed. Moreover, Staton complied with the instructions for Section III to FCC Form 301 because it had the signed bank letter on November 15, 1991, the day the application was filed at the FCC. Huber's allegations of misrepresentation are wholly without merit and should be given short shrift.

serve as support for any funding source which Ms. Staton was certifying to. Section III of the Staton application sets forth clearly and explicitly that Staton was relying solely on financing to be provided by the Home Trust bank. Nowhere in describing its financial plans did Staton represent or ever hint that it was relying upon Mr. Ramsey's personal funds. Accordingly, the fact that the footnote was erroneously included in the document was not considered material by Ms. Staton; it was not anything upon which she was asking or expecting the Commission to rely. Moreover, because Staton's application relies entirely upon a bank loan for financing, and not the personal resources of the nonvoting shareholder, Ms. Staton did not think it was essential to review Mr. Ramsey's personal financial statement. See Declaration of Mildred Staton, included as Attachment 3 hereto. The fact is that there was no intent whatsoever to deceive the Commission as the matter of the footnote was merely an innocent oversight by Ms. Staton.

FCC precedent requires that there be "substantial evidence of an intent to deceive" before a party can be disqualified for misrepresentations. Armando Garcia, 3 FCC Rcd. 1065, 1067 (Rev. Bd. 1988). Indeed, fraudulent intent "can be found from a motive to deceive." Capital City Broadcasting Co., 8 FCC Rcd. 1726, 1735 (Rev. Bd. 1993). Here, however, Ms. Staton did not intend to mislead the Commission with this oversight nor was any motive or incentive for such a deception. The Commission does not require applicants to certify the availability of funds to prosecute an

application prior to grant of a construction permit, but only to certify the availability of funds to construct and operate the facility once the permit is granted.

Huber's reliance on Capital City Broadcasting Co. is misplaced. In that case, the Review Board found a "motive to deceive" in the case of a party who denied that he was an officer of a corporation. The ALJ had determined that the party was unwilling to reveal his ties "because of its obvious comparative impact." Id. at 1735. In sharp contrast, the issue highlighted by Huber, the availability of funds to prosecute the application, is a purely private contractual matter between the shareholders, for which no comparative benefit or enhancement could be claimed.

In a case analogous to the instant situation, Pleasure Island Broadcasting, Inc., 6 FCC Rcd. 4163, 4164 (1991), the Review Board found no motive to deceive, and thus, no misrepresentation based upon an exaggerated claim of an officer's title, because no comparative credit could be garnered from the claim, and because the witness was candid in her testimony. The issue of the funding for prosecution expenses is similarly irrelevant to the comparative evaluation of the parties, and Ms. Staton has been completely forthcoming in admitting that she did not review Mr. Ramsey's financial statement.

#### **D. Conclusion.**

Huber is simply going to ridiculous lengths to manufacture

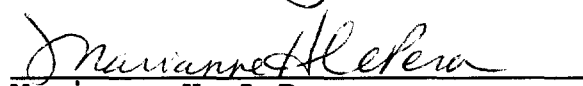
the New Albany FM station. As indicated herein, Mr. Thompson is clearly not a real party-in-interest to the Staton application, Mr. Ramsey's participation in the application has been fully set forth and, under Evansville Skywave, may be fully explored comparatively. Ms. Staton properly certified the financial qualifications of Staton based on the explicit requirements of Form 301. No misrepresentations were made with respect to the financial certification and the Stock Subscription and Shareholders' Agreement. Staton respectfully requests that the Petition to Enlarge issues filed by Huber be denied.

Respectfully Submitted,

**STATON COMMUNICATIONS, INC.**

By:

  
Donald J. Evans

  
Marianne H. LePera

Its Counsel

McFadden, Evans & Sill  
1627 Eye Street, N.W.  
Suite 810  
Washington. D.C. 20554

(202) 293-0700

July 22, 1993



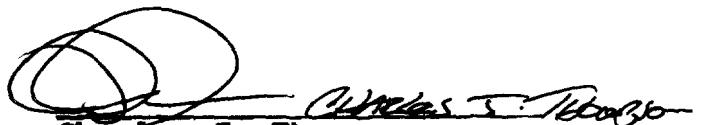
DECLARATION OF CHARLES J. THOMPSON

I, Charles J. Thompson, do hereby declare:

1. I was hired as a broadcast consultant in connection with the preparation of an application for a new FM station on Channel 234A in New Albany, Indiana. My services included engaging the services of an engineer to do initial propagation studies and to prepare the engineering portion of the application, recommending an attorney to put the application together, assisting in the location of a site and conducting a search to find a suitable business partner for Mr. Ramsey. In exchange for these services, I was paid a consulting fee.
2. Upon the filing of the New Albany application, my services were concluded. I have had no input into the current proceeding since the filing of the application, other than to respond to informational requests from Staton Communications' counsel in connection with discovery.
3. I hold no past, present or future ownership interest in the applicant, Staton Communications, Inc. My participation has been in the role as a consultant only, for which I received a consulting fee. I have no understanding or agreements whatsoever regarding any ownership interest on my part in this venture. I have put none of my own funds into the venture, nor do I have a right to receive any of the profits therefrom.

I hereby certify, under penalty of perjury, that my foregoing Declaration is true and correct to the best of my knowledge, information and belief.

7-21-93  
Date

  
Charles J. Thompson

DECLARATION OF KENNETH L. RAMSEY

I, Kenneth L. Ramsey, do hereby declare that:

1. I am 80% non-voting shareholder in Staton Communications, Inc., applicant for a new FM station on Channel 234A, New Albany, Indiana.
2. I negotiated the bank letter upon which Staton Communications, Inc. relies for its financial qualifications. In my dealings with the banker, Mr. W. A. Gainey, I provided a hand-annotated copy of a loan commitment letter I had received from another bank in connection with a different FCC application. A copy of this hand-annotated bank letter is attached hereto as Exhibit 1. I provided the hand-annotated letter to Mr. Gainey to use as a model, because Mr. Gainey was unfamiliar with the FCC's requirements in drafting a loan commitment letter.
3. Mr. Gainey and I negotiated the terms of the loan, and Mr. Gainey took my loan request before a loan board at the Home Trust Bank for approval. I was informed on or before November 13, 1991 that the bank letter was approved by the Board. I immediately informed Mildred Staton that the bank letter had been approved in substantially the form of documentation which I had in hand and in the amount which we had requested. The application form was prepared on this basis.
4. All that remained was the ministerial act of the bank actually re-typing the letter in its letterhead and sending it to me.

several days at this time, there was a delay in getting the formal bank letter typed. Mr. Gainey repeatedly assured me that the letter was going to be typed and provided to me. At no time after the Board approved the bank letter was the bank's conditional loan commitment in question. I received the signed bank letter from Mr. Gainey, on November 15, 1991 by fax.

5. Upon receiving the signed bank letter on November 15, 1991, I immediately called Mr. Emert, Staton's attorney at that time, and Mildred Staton, the president of the company, to advise them that the letter was in hand. I then mailed a copy of the letter to Ms. Staton and Mr. Emert.

I hereby certify, under penalty of perjury, that my foregoing Declaration is true and correct to the best of my knowledge, information and belief.

*July 22 1993*

*Kenneth L. Hammer*

Attachment 2  
Exhibit 1

PHONE 502/589-9000



# Shelby County Trust Bank

Produced  
at Station's  
deposition  
6/9/92

JAMES E. MASSEY  
SENIOR VICE PRESIDENT

P.O. Box 249 Shelbyville, Kentucky 40065

PHONE 502/633-1000 MEMBER FEDERAL DEPOSIT INSURANCE CORPORATION

November 21, 1990

MS. MILDRED STATION

~~Ms. Secorro Mandujano Medina~~

Mr. Kenneth L. Ramsey

~~Mandujano Communications, Inc.~~

~~1317 E. 14th Street~~

~~Amarillo, Texas 79102~~

STATION  
~~FEAR~~ COMMUNICATIONS, INC.  
LOUISVILLE, KY.

Dear Ms. ~~Medina~~ and Mr. Ramsey:

NEW ALBANY, INDIANA 425.000

This is to state our conditional commitment to loan up to \$500,000 to finance construction and initial operation of radio station FM Ch. 234-A 265C1, licensed to serve Amarillo, Texas 79102. Our willingness to do so is subject to the following conditions:

- 1) You are successful in obtaining approval from the Federal Communications Commission to construct and operate the radio broadcast station; and
- 2) All reasonable and ordinary credit criteria of the Shelby County Trust Bank are met at such time as you (a) have received the permit to construct said station and (b) request from the Shelby County Trust Bank a formal and unconditional lending commitment.

While the pricing and terms of amortization of any loan commitment will of course be contingent upon the exact credit conditions prevailing at the time of such commitment, we contemplate calculating interest on any loan made at the rate of 2% above the Prime rate of this Bank at the time of each advance (for information, the Prime rate of this Bank is presently 10.5%) and, any loan made will be repaid, after a one-year moratorium on principal repayment as necessary, in eight equal semi-annual installments or as otherwise reasonable in line with the financial projections received prior to the time of borrowing.

TRUST, we built our name on it!

The precise terms for security of the loan also will be determined at the time of the unconditional loan commitment. However, we contemplate requiring a pledge of the stock of the applicant in the event that it is incorporated, a pledge of the assets of the radio station (subject to security liens held by vendors of equipment, if any) and we may also require personal guarantees in a form satisfactory to the Bank. Our loan documents will comply with all requirements of the Federal Communications Commission including the provision of a minimum of ten (10) days prior written notification to you and to the Federal Communications Commission before any equipment will be repossessed under any default clause of the loan agreement. This Bank is favorably acquainted with you and we would be relying on your commitment to continued participation in the venture and the management of the radio station as a part of the loan application.

Sincerely,


DECLARATION OF MILDRED J. STATON

I, Mildred J. Staton, do hereby declare that:

1. I am President of Staton Communications, Inc., applicant for a new FM Station on Channel 234A in New Albany, Indiana.
2. In the application, I certified that Staton Communications, Inc. is financially qualified to construct and operate the proposed facility. I did so knowing that the conditional loan commitment had been approved by the bank's loan board, and that Ken Ramsey and I were simply awaiting the typed letter. There was no doubt on November 13, 1993, when I signed the application, that the conditional loan commitment was approved and that the funds were available from a committed source.
3. When I signed the Stock Subscription and Shareholders Agreement, I overlooked the provision in footnote one which states that the voting shareholder had reviewed the financial statement of the non-voting shareholder. I had discussed Mr. Ramsey's personal financial status with him, and was satisfied of his ability to fund the prosecution expenses of the Staton application. I certainly did not intend to deceive the Federal Communications Commission when I signed the document.

I hereby certify, under penalty of perjury, that my foregoing Declaration is true and correct to the best of my knowledge, information and belief.

7/22/93  
Date

  
Mildred J. Staton

**Attachment 4**



1           A.    I told him to get me the details on it and let  
2 me know what was going on.

3           Q.    Okay. Did he provide you with additional  
4 information?

5           A.    Yes, he sent me up the -- I guess the public  
6 notice or the digest showing what the filing window was,  
7 when it was opening, when it was closing, and gave me  
8 the approximate amounts it would cost to file in the  
9 market.

10          Q.    He gave you -- what was his estimate of how  
11 much it would cost?

12          A.    He was interested in filing the application,  
13 taking care of the details.. And I think we agreed on a  
14 price of \$3,450.

15          Q.    Okay.

16          A.    That was for his part.

17          Q.    That was just for Mr. Thompson's services,  
18 correct?

19          A.    That also included him contacting an engineer  
20 to do the propagation studies, to make sure the station  
21 would cover Louisville, Kentucky.